IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al., Plaintiffs, v. TYSON FOODS, INC., et al., Defendants.	Case No. 4:05-CV-329-TCK-SAJ

DEFENDANTS' RESPONSE IN OPPOSITION TO THIRD PARTY DEFENDANT WANDA L. DOTSON'S MOTION TO DISMISS THIRD PARTY PLAINTIFFS' THIRD PARTY COMPLAINT OR IN THE ALTERNATIVE, TO SEVER AND STAY THIRD PARTY COMPLAINT

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COME NOW Defendants, Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; and Willow Brook Foods, Inc. (collectively, "Defendants"), and, by and through their respective attorneys, hereby submit the following *Response in Opposition to Third Party Defendant Wanda L. Dotson's Motion to Dismiss Third Party Plaintiffs' Third Party Complaint or in the Alternative, to Sever and Stay Third Party Complaint* (the "*Motion*") (Docket No. 564).

I. INTRODUCTION

Plaintiffs' case is predicated upon decades of activities within the million-plus acre Illinois River Watershed ("IRW") and alleged injury to the "biota, lands, waters, and sediments therein." First Amended Complaint ("FAC") at ¶ 31. Like any watershed, the IRW is affected by numerous natural phenomena and anthropogenic activities. Despite this fact, Plaintiffs decided to pursue contingency fee litigation against only the Defendants for all of the alleged problems in the IRW. Rather than develop a responsible watershed management strategy addressing all sources of alleged pollution within the IRW, Plaintiffs found it more politically expedient to attempt to extract money from out-of-state corporations. Defendants have, in turn, filed a Third Party Complaint ("TPC") which asserts claims against persons or entities who have conducted operations that likely have caused or contributed to the same harm alleged by the Plaintiffs. Essentially, Defendants have been forced to do what Plaintiffs will not – *i.e.*, acknowledge that this litigation must include all persons and entities whose activities may directly affect the IRW.

Third Party Defendant Wanda L. Dotson ("Ms. Dotson") has moved this Court to either (1) dismiss Defendants' TPC; or (2) sever and stay the Third Party Action. This Court should

deny the *Motion* for several reasons. First, severing or staying the Third Party Action would in no way simplify the legal or factual issues raised by the FAC. The question of whether and to what extent third parties have contributed to any alleged pollution of, or injury to, "the biota, lands, waters, and sediments" (FAC at ¶ 31) of the IRW has been part of this case since its inception. The question of relative contributions to that asserted injury – with all of the attendant discovery and third party practice – is necessary to the core causation and damage theories of the Plaintiffs' claims and thus, was not created by the TPC. Second, a request for severance or similar proposals related to case management or trial of the issues set forth in the FAC and the TPC should not be considered until all of the Third Party Defendants ("TPDs") have answered and been heard by the Court on these matters. Finally, even putting aside the premature nature of the *Motion*, Ms. Dotson has failed to identify any legal basis upon which dismissing the TPC would be proper.

Ms. Dotson has jumped the gun. Her *Motion* raises three different issues with respect to the TPC: (1) whether and how the Defendants should be permitted to take discovery of relevant facts in the possession of the TPDs; (2) whether the TPC should be dismissed in advance of such discovery and the normal development of claims; and (3) whether it is appropriate to address case management issues (including trial procedure and the issue of severance) before the Parties have engaged in meaningful discovery. As to each of these issues, Ms. Dotson ignores the Federal Rules of Civil Procedure, the posture of this case, and the interests of other TPDs.

First, with respect to discovery, any reading of the FAC clearly demonstrates that discovery from third parties will be necessary to the Plaintiffs' claims and the Defendants' defense. The Plaintiffs' case is predicated upon claims of pollution and alleged natural resource damages resulting from decades of activities within the million-plus acre IRW. The TPDs,

including Ms. Dotson, engage in activities which are likely to have affected the condition of natural resources within the IRW, so the activities of the TPDs are critical to issues of causation, damages, and the imposition of joint and several liability.[1] Accordingly, the TPDs will be participating in the discovery process in this case, either as parties or pursuant to subpoena. The "stay" requested by Ms. Dotson is, therefore, impossible given the claims that Plaintiffs assert.

Second, the question of which, if any, third party claims ought to be dismissed should only be decided after the Court decides which, if any, of Plaintiffs' claims should be dismissed. This common-sense ordering is required not only by basic notions of judicial efficiency, but also by concerns for due process. The TPDs should be heard before this Court rules on any dispositive motions determining or affecting their potential liability.

Third, the question of whether Plaintiffs' claims and the TPC should be tried together or separately is so premature that it is impossible for the Court or the Parties to meaningfully evaluate. None of the claims in the FAC or the TPC have been developed and no substantive motions have been decided. At this juncture, it is unclear which claims in the FAC will survive, what parties will be present at trial, and the extent to which the ultimate issues and parties will be inextricably intertwined. Therefore, before the Court considers the issues raised in Ms. Dotson's *Motion*,[2] the Court should allow the case to develop through discovery, normal preliminary

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[1] Defendants continue to assert that their operations and those of the independent family farmers with whom they contract for raising poultry have not caused any "pollution" or injury to the IRW or the natural resources of the State. Defendants demand strict proof of the State's claims, and maintain that these operations are lawfully conducted in conformance with Nutrient Management Plans and Animal Waste Management Plans endorsed and/or mandated by the State of Oklahoma, the United States government, and/or the State of Arkansas.

[2] As explained in Defendants' *Response* in opposition to Plaintiffs' *Motion to Sever and Stay and/or Strike or Dismiss the Claims Asserted in the Third Party Complaints* ("*Plaintiffs' Motion to Dismiss*") (respectively, Docket Nos. 495 and 247), these arguments regarding the premature nature of Ms. Dotson's *Motion* are equally applicable to the *Plaintiffs' Motion to Dismiss*. Indeed, Ms. Dotson's *Motion* appears to be substantially similar to the *Plaintiffs'*

proceedings, and the pleadings yet to be filed by the remaining TPDs. More specifically, the Defendants must be allowed an opportunity to demonstrate that the TPC asserts claims against persons or entities who have conducted operations causing or contributing to the same harm alleged by the Plaintiffs; that the TPDs may be derivatively liable to Defendants on substantially the same evidence and legal theories (if any) supporting the Plaintiffs' claims; and that evidence of the TPDs' conduct is an integral part of the Plaintiffs' claims and the Defendants' defense.

In sum, the substantial identity of issues between the FAC and the TPC means that the real (but premature) question presented by Ms. Dotson's *Motion* is whether this Court will decide to hear evidence of the TPDs' IRW activities once, during this litigation, or two or more times, during subsequent litigation in the event any Defendant is held jointly and severally liable for the claims asserted by the Plaintiffs. Defendants respectfully submit that the interests of the Court, the public, and the Parties will be best served by avoiding such redundant, unnecessary litigation, and that this Court should therefore deny Ms. Dotson's *Motion*.

II. ARGUMENTS AND AUTHORITIES

A. Impleader Serves the Interests of Judicial Economy and Avoids Prejudice to Parties by Avoiding Unnecessary, Redundant Litigation.

Rule 14 allows any defendant to assert claims against any person not already a party to the action "who is or may be liable" to the defendant "for all or part" of the plaintiff's claims against the defendant. FED. R. CIV. P. 14(a). Rule 14 promotes judicial economy and fairness by allowing one action to fully adjudicate all claims arising out of substantially the same factual situation, thereby saving time and costs associated with duplication of evidence or multiple trials; obtaining consistent results from identical or similar evidence; and avoiding prejudice to the

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Motion to Dismiss (Docket No. 247). Accordingly, the Defendants incorporate herein by reference their *Response* (Docket No. 495) to the *Plaintiffs' Motion to Dismiss*.

defendant arising from the time difference between judgment against him and judgment in his favor against a third party defendant. *See Hicks v. Long Island R.R.*, 165 F.R.D. 377, 379 (E.D.N.Y. 1996); *Lyons v. Marrud, Inc*. 46 F.R.D. 451 (S.D.N.Y. 1968); *Williams v. Skibs A/S Hilda Knudsen*, 28 F.R.D. 398 (E.D.Pa. 1960). Because Rule 14 is remedial in character, it should be construed liberally. *See Tower Mortg. Corp. v. Reynolds*, 81 F.R.D. 560 (W.D. Okla. 1978).

B. This Court Should Deny Ms. Dotson's Motion to Dismiss or, in the Alternative, to Sever and Stay the TPC.

When considering a challenge to a third party complaint, the court must engage in a two-part inquiry. First, the court must determine whether the complaint contains viable claims against the third party defendants. *See* Wright & Miller, 6 FED. PRAC. & PROC. CIV. 2D, § 1443, 1446 (2005). If the third party complaint contains claims through which the third party defendants may be liable to defendants for **all or part** of the claims asserted by the plaintiff, there is no legal basis to dismiss the complaint. *See id*. Second, the court must determine whether the third party action should be severed or stayed by considering: (1) the potential prejudice to plaintiffs, defendants, and third party defendants; (2) the status of discovery in the action; (3) the timing of the third party complaint; and (4) whether maintenance of the third party action will support judicial economy. *See In re CFS-Related Sec. Fraud Litig.*, 213 F.R.D. 435, 437-38 (N.D. Okla. 2003) "[W]hile the court must weigh efficiency against prejudice, the case law makes clear that this is not a neutral balancing, and that generally, the interests of efficiency will outweigh the dangers of prejudice." *Hicks*, 165 F.R.D. at 379. Under this analysis, the Court should deny Ms. Dotson's *Motion* because the TPC contains viable claims against Ms. Dotson and the other TPDs, and because the equities weigh in favor of maintaining the Third Party Action. *See In re CFS-Related Sec. Fraud Litig.*, 213 F.R.D. at 437-38.

1. Ms. Dotson Has Failed to Identify Any Legal Basis to Dismiss the TPC.

A motion to dismiss a third party claim succeeds only if the third party complaint is "obviously unmeritorious and can only delay or prejudice" the disposition of other claims. Advisory Note to 1963 Amendment of Fed. R. Civ. P. 14; *accord Hartford Fire Ins. Co. v. County Asphalt, Inc.*, 2002 WL 31654853, *3 (S.D.N.Y. Nov. 22, 2002). Under this standard, Ms. Dotson's *Motion* must be denied because the TPC contains meritorious, cognizable claims against Ms. Dotson and the other TPDs, and because maintenance of the Third Party Action will not prejudice Ms. Dotson, the Plaintiffs, or the other TPDs. *See id.*

a. Defendants have an express, unqualified federal right of contribution against Ms. Dotson and the other TPDs.

Concerned about the potential for unfairly requiring defendants to pay for damages they did not cause, Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*., in 1986 to codify the federal common law right of contribution. *See* 42 U.S.C. § 9613(f)(1); *Pinal Creek Group v. Newmont Mining Corp*., 118 F.3d 1298, 1300 (9th Cir. 1997). Specifically, Congress provided that "[a]ny person may seek contribution from any other person who is liable or potentially liable" under CERCLA. 42 U.S.C. § 9613(f)(1) (emphasis added). The 1986 amendments also gave defendants the right to assert their contribution claims "during or following" any action brought pursuant to CERCLA Section 9607(a). *See id*. (emphasis added). By allowing CERCLA defendants to assert contribution claims as soon as they are sued, "CERCLA makes possible the joinder of all potentially responsible parties in a single case, an early identification of potentially responsible parties for purposes of settlement, and as [sic] a single judicial apportionment of cleanup costs among responsible parties." *OHM Remediation Servs. v. Evans Cooperage Co., Inc*., 116 F.3d 1574, 1582-83 (5th Cir. 1997).

Despite the fact that Congress did not place any limits on a defendant's right to assert contribution claims against other potentially responsible persons, Ms. Dotson argues that Defendants' contribution claims are "open to question" because there is "authority" suggesting that intentional actors under CERCLA do not have a right of contribution. *See Motion* at 15, *citing United States v. Ward*, 618 F. Supp. 884, 911 (E.D.N.C. 1985). As an initial matter, Defendants note that if Congress had intended to prohibit "intentional actors" from seeking contribution under CERCLA, it could easily have done so by including such a limitation in Section 113. Congress chose not to do so. Instead, Congress spoke plainly by allowing "any" CERCLA defendant to assert contribution claims against any other person who may be potentially liable for the claims asserted against the defendant. Therefore, this Court should reject Ms. Dotson's unsupportable position on CERCLA contribution. *See United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 242-43 (1989) (the plain language of a statute controls unless the language is ambiguous or if strict adherence to the language creates absurd results that contravene the intent of Congress); *accord St. Charles Inv. Co. v. Comm'r of Internal Revenue*, 232 F.3d 773, 776 (10th Cir. 2000).

In addition to the fact that Ms. Dotson's arguments are contrary to the plain language of CERCLA, Ms. Dotson's cited "authority" for this proposition is not applicable because: (1) the *Ward* decision was issued before Congress created an express, unqualified right of contribution under CERCLA; (2) no court has ever relied upon *Ward* to prohibit CERCLA contribution claims; and (3) at least one district court has held to the contrary after the 1986 amendments, specifically concluding that the right of contribution exists regardless of whether defendants acted intentionally or knowingly. *See, e.g., United States v. Franklin P. Tyson*, 1988 WL 17003 at *1 (E.D.Pa.) (holding that a defendant who knew its hazardous wastes were being disposed of

could still assert contribution claims under CERCLA because even "the willful misconduct of one responsible party does not absolve all other responsible parties of liability" under CERCLA).

Moreover, Ms. Dotson's reliance on Section 886A(3) of the Restatement (Second) of Torts (*see Motion* at p. 15) is unavailing as her position is undermined by the comments interpreting that very section. Specifically, the comment to subsection (3) ("*Intentional and reckless tortfeasors*") states that the rule prohibiting contribution actions by intentional tortfeasors does not apply if the alleged conduct was a violation of a statute or "purely technical tort without any real intent to do harm…." *Id.* at Cmt. j. Defendants have not intentionally caused any harm, intentionally violated any laws or regulations, or intentionally disposed of any "wastes," and the Court should not allow itself to be prejudiced by the allegations asserted in the FAC and parroted by Ms. Dotson in her *Motion*.

Plaintiffs have asserted two causes of action against Defendants pursuant to CERCLA Section 9607(a). *See* FAC at ¶¶ 70-89. Defendants will present evidence that scores of parties, including the State of Oklahoma, Ms. Dotson, and other TPDs are also potentially liable under CERCLA. *See, e.g., Answer and Affirmative Defenses of Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. to the First Amended Complaint (Nineteenth and Thirty-Eighth Affirmative Defenses)* (Docket No. 73); TPC at ¶ 210. With respect to Ms. Dotson, Defendants will present evidence that she is potentially liable for the damages alleged by the Plaintiffs because she has engaged in cattle grazing and crop fertilizing activities which have resulted in releases of constituents into the IRW. *See id.* at ¶ 161. Therefore, under the express provisions of CERCLA, Defendants have viable contribution claims that they are entitled to assert during this action. *See* 42 U.S.C. § 9613(f)(1); *Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 567 (10th Cir. 1996).

b. Defendants have a right of contribution against Ms. Dotson and the other TPDs for Plaintiffs' statutory claims of nuisance.

Oklahoma enacted the Uniform Contribution Among Tortfeasors Act (the "Contribution Act") to ensure that damages in tort actions are distributed proportionately among all tortfeasors. *See Barringer v. Baptist Healthcare of Oklahoma*, 22 P.3d 695, 698 (Okla. 2001); OKLA. STAT. tit. 12, § 832(A). The Contribution Act "creates the right of contribution among joint tortfeasors" who become jointly or severally liable in tort for the same injury to property, even though judgment has not yet been recovered against any of them. *See id.* The contingent right of the third party plaintiff for recovery against the third party defendant accrues at the same time plaintiff's right of recovery arises. *See Lambert v. Inryco, Inc.*, 569 F. Supp. 908 (D.Okla. 1980); *Niece v. Sears, Roebuck & Co.*, 293 F. Supp. 792, 794 (D.Okla. 1968).

Defendants have viable contribution claims against Ms. Dotson and the other TPDs for potential damage awards or costs of injunctive relief arising from Plaintiffs' nuisance claims. Plaintiffs seek to hold Defendants jointly and severally liable for nuisance under a myriad of legal theories sourced from both common law and Oklahoma statutes. *See* FAC at ¶¶ 98-108. Under these theories, Plaintiffs seek recovery for pollution-based damages, including payment of all costs of remediation and assessment. *See Motion* at 4. Therefore, under the liability framework established by the Contribution Act, Defendants have a contingent, statutory right of contribution against the TPDs because Plaintiffs seek to hold only Defendants liable for alleged injuries to the IRW – alleged injuries for which Ms. Dotson and the other TPDs should be held jointly or severally liable as contributors to the alleged common injury if any Defendant is held liable. *See* OKLA. STAT. tit. 12, § 832(A).

Ms. Dotson challenges Defendants' contribution claims by asserting that there is no right of contribution in favor of any tortfeasor who has "intentionally caused or contributed to" the

alleged injury. *See Motion* at 5, citing OKLA. STAT. tit. 12, § 832(C). Ms. Dotson then argues that Defendants have no right of contribution against the TPDs "[i]nasmuch as the State's state law nuisance…claims sound in intentional tort…." *See Motion* at 5. As stated earlier, Ms. Dotson wrongly attempts to use the *Motion* as a means to adjudicate the issue of whether Defendants can be said to have acted "intentionally" because that issue is a highly-disputed, ultimate issue of fact which cannot be decided upon the present record. The mere fact that the Plaintiffs have *alleged* Defendants acted "intentionally" does not make it so. Therefore, unless and until Plaintiffs can meet their burden of convincing a jury in this regard, Defendants should not be prejudiced by a premature denial of their contribution claims against the TPDs. Furthermore, Ms. Dotson's attack on Defendants' contribution claims is more "wordplay" than substance because the necessary corollary to Ms. Dotson's argument is that "inasmuch" as Plaintiffs' state law nuisance claims do not sound in intentional tort, Defendants have a right of contribution.

Additionally, it is not clear from the FAC that Plaintiffs' allegations of intentional conduct by Defendants are part of each of Plaintiffs' theories of nuisance. For example, Plaintiffs have asserted statutory claims for nuisance *per se* (under OKLA.STAT. tit. 27A, § 2-6-105 and OKLA. STAT. tit. 2, § 2-18.1) which do not include or require any allegation that Defendants acted intentionally and thus, apparently do not "sound in intentional tort." *See* FAC at ¶¶ 103-104.. Defendants' right to assert contribution claims for this type of statutory nuisance is not only implied by the Contribution Act, it has also been expressly recognized by the Tenth Circuit. *See Conoco, Inc. v. ONEOK, Inc.*, 91 F.3d 1405 (10th Cir. 1996).

In *Conoco*, the State of Oklahoma ordered Conoco to remediate a site damaged by a gasoline pipeline leak and private landowners later brought suit against Conoco for alleged

groundwater contamination arising from the same leak event. Conoco brought a third party action against ONEOK, alleging that the leak was caused by the installation of a natural gas pipeline on top of Conoco's pipeline. *See id*. at 1407. The Tenth Circuit held that it was error to prohibit Conoco from asserting a contribution claim against ONEOK for the state-ordered remediation costs. *See id*. at 1409. The Court cited OKLA. STAT. tit. 12, § 832(A) for the rule that when two or more persons become jointly or severally liable in tort for the same injury, there is a right of contribution among them. *See id*. Further, the Court stated that

> Conoco committed a tort and the State of Oklahoma suffered an injury when the gasoline and fuel oil from the 1976 leak polluted state waters. *See* OKLA. STAT. tit. 27A, § 2-6-105 (1996) ("It shall be unlawful for any person to cause pollution of any waters of the state….Any such action is hereby declared to be a public nuisance."). The parties stipulated that the State ordered Conoco to remediate the 1976 leak site…The costs Conoco incurred in complying with the State's order were the direct result of a tort committed against state waters, and Conoco presented evidence at trial that ONG was jointly or severally liable for the leak that caused the pollution. We therefore hold that the jury should have been instructed under a contribution theory on the state-ordered remediation costs.

Id. at 1409. As in *Conoco*, Plaintiffs allege that Defendants have committed a tort against state waters and should therefore be held liable under OKLA. STAT. tit 27A, § 2-6-105 for a public nuisance *per se*. *See* FAC at ¶ 103. Further, as in *Conoco*, Plaintiffs are asserting claims for costs associated with remediation. *See* FAC at ¶ 105. Therefore, under the Tenth Circuit's holding, Defendants likewise have a right of contribution for any remediation costs arising from Plaintiffs' claim of nuisance pursuant to OKLA. STAT. tit 27A, § 2-6-105. *See id*.

The Tenth Circuit's reasoning in *Conoco* seems equally applicable to claims of a nuisance *per se* under OKLA. STAT. tit. 2, § 2-18.1. Like OKLA. STAT. tit. 27A, § 2-6-105, OKLA. STAT. tit. 2, § 2-18.1(A) defines activities that create a public nuisance *per se* and uses the same language to effect its common goal of preventing "pollution of any air, land or waters of the state." Therefore, under the reasoning of *Conoco*, and in light of the identity of language

and purpose between the statutes, Defendants should likewise have a contribution claim for remediation costs associated with this alleged tort against State waters. *See Conoco* at 1409.

Moreover, to the extent that any of Plaintiffs' claims for alleged violations of Oklahoma statutes and regulations seek remediation of pollution-based injuries or "tort[s] committed against State waters," the *Conoco* decision likewise supports Defendants' contribution claims against the TPDs. *See id*. at 1409. Ms. Dotson as much as concedes Defendants' right to contribution claims for pollution-based damages by arguing that Defendants have no right of contribution "[i]nasmuch as the focus of these state-law statutory claims is regulating and deterring conduct rather than compensating for injury." *See Motion* at 10. Like her position regarding intentional torts, Ms. Dotson's argument is nothing more than wordplay because the necessary corollary to Ms. Dotson's assertion is that "inasmuch" as the focus of Plaintiffs' state law statutory claims is compensating for injury, rather than regulating and deterring conduct, Defendants have a right of contribution. *See id*.

Although there is no discussion of contribution in the state statutes upon which Plaintiffs assert claims against Defendants, third party claims have been allowed in enforcement actions brought by the State under similar circumstances. For example, in *Illinois v. Fiorini,* 548 N.E.2d 729 (Ill.App.3d 1989), Illinois brought an action against owners of a disposal site seeking injunctive relief and civil penalties. The court considered whether defendants could maintain a third-party action to recover any cleanup costs required by Illinois. Although the court found that defendants would not have contribution claims for any fines or penalties assessed against defendants for their violations of the state statute, *see id*. at 734, the court noted that, because the State of Illinois also sought injunctive relief to clean up the disposal site, certain third party defendants may be liable to defendants for part of those cleanup expenses and that maintenance

of the third party action would also serve "the well established judicial goal of avoiding piecemeal litigation." *See id*. at 734-35.

c. Defendants have viable claims for unjust enrichment against Ms. Dotson and the other TPDs.

Ms. Dotson's arguments regarding Defendants' unjust enrichment claims will likely soon be mooted by Defendants' impending request for leave to file an Amended Third Party Complaint which will clarify that Defendants are not asserting unjust enrichment claims against the TPDs under the theory of contribution.[3] Instead, it is Defendants' intent to assert direct, but derivative, claims for unjust enrichment against the TPDs to the extent that Defendants are spending, and may be required to spend, money responding to, investigating, sampling, monitoring, remediating, and/or compensating the State for alleged injury within the IRW, where such injury was caused by the actions of the TPDs. Any such payments by Defendants would constitute unjust enrichment because Defendants would be conferring a substantial benefit upon the TPDs by paying for costs that should rightfully be born by the TPDs. *See Moore v. Texaco, Inc*., 244 F.3d 1229, 1233 (10th Cir. 2001) (applying Oklahoma law to hold that a plaintiff may pursue a claim for unjust enrichment if he can show that the defendant "caused any pollution or…has any responsibility for cleaning up the pollution" for which plaintiff has incurred costs).

d. Defendants have asserted a viable citizen suit against Ms. Dotson and the TPDs under the Resource Conservation and Recovery Act ("RCRA").

As to Ms. Dotson's argument that Defendants are not entitled to contribution from TPDs regarding the State's RCRA claims, Ms. Dotson appears to have misconstrued the nature of the relief requested by Defendants. In Paragraphs 218-221 of the TPC, Defendants allege that, to the extent the constituents found in poultry litter constitute a "solid or hazardous waste," the

[3] Indeed, most of Ms. Dotson's arguments regarding the validity of the claims asserted in the TPC will be rendered moot through the filing of the Amended Third Party Complaint.

application of which would present "an imminent and substantial endangerment to health and environment in the IRW," the TPDs' operations likewise result in the release of some or all of the same constituents as those alleged to be found in poultry litter.

Therefore, Defendants are not asserting a contribution claim against the TPDs under RCRA. Instead, Defendants' claims arise out of: (1) unjust enrichment, because the TPDs who use and/or release the same type of constituents as those contained in poultry litter may be unjustly enriched if Defendants are required to participate in any remediation efforts and TPDs are not required to also participate; and/or (2) a contingent, derivative RCRA citizen suit under § 6972(a)(1)(B), seeking injunctive relief against such TPDs requiring them to participate in any injunctive relief, clean-up, assessment, or remediation efforts.

This type of relief is not precluded by the United States Supreme Court's decision in *Meghrig v. KFC Western, Inc*., 516 U.S. 479 (1996). While the *Meghrig* Court held that RCRA does not afford an opportunity for private citizens to recover costs of cleanup which they incurred in the past, the Court specifically refused to decide "whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has properly commenced." *Id*. at 488. As the Supreme Court explained, the two types of remedies available under § 6972(a)(1)(B) are: (1) a mandatory injunction (*e.g*., requiring a responsible party to attend to cleanup or disposal of a waste); or (2) a prohibitory injunction (*e.g*., restraining a responsible party from further violating RCRA). *Id*. at 484. To the extent Defendants are pursuing a citizen suit against the TPDs, the relief requested by Defendants through the TPC is entirely prospective injunctive relief appropriately brought pursuant to § 6972(a)(1)(B). *See, e.g., Walker v. TDY Holdings, LLC*, 135 F. Supp.2d 787, 789 (S.D. Tex. 2001) (holding that "there is no discernable reason why the [RCRA citizen suit] notice

requirements should not apply to third party complaints as well as original actions").

2. Severing or Staying the Third Party Action Will Not Reduce the Issues or the Evidence to Be Heard By the Court.

Rule 14 permits a court to sever a third party claim or accord it separate trial if the court determines that maintenance of the third party action would result in confusion or undue prejudice. *See* 1963 Amendments and Advisory Notes for Rule 14. However, severance is an exception to the general preference for the promotion of judicial economy through consolidation of matters and should therefore be used only in exceptional circumstances. *See Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 693 (S.D.N.Y. 1996). Likewise, separate trials should only be granted if the issues to be tried are "so distinct and separate from the others that a trial of [them] alone may be had without injustice." *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993).

Thus, the questions before the Court are: (1) whether the claims against the TPDs are significantly different from the Plaintiffs' claims;[4] (2) whether the issues are triable by the jury or the court; (3) whether the posture of discovery as to the respective issues favors separate trials; (4) whether the issues require different proof; and (5) whether the non-movant will be prejudiced by a severance. *See Flair Broadcasting Corp. v. Powers*, 1995 WL 507314, at *2 (S.D.N.Y. Aug. 28, 1995). As a practical matter, "[t]hird-party claims brought under the authority of Rule 14 are rarely stayed." *Arthur Andersen, LLP v. Standard & Poor's Credit*, 260 F.Supp.2d 1123, 1125 (N.D.Okla. 2003).

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[4] With respect to maintenance of a third party complaint, "[i]t is no barrier that the claims…are not identical and that some facts may not be material to both aspects of the case…[Rule 14] is operative where 'defendant's right against the third party is merely the outgrowth of the same aggregate or core of facts which is determinative of the plaintiff's claim'" – in this case, alleged injury to, and pollution of, the IRW. *Crompton-Richmond Co., Inc., Factors v. United States*, 273 F. Supp. 219, 221 (S.D.N.Y. 1967), *quoting Dery v. Wyer*, 265 F.2d 804, 807 (2nd Cir. 1959).

In this case, the FAC raises a myriad of complex scientific, agronomic, economic, social, and public policy issues involving the lives and activities of hundreds of thousands of persons and the 1,600 plus square mile watershed in which they live and work. Accordingly, the Court should deny Ms. Dotson's request to sever or stay the Third Party Action because: (1) the TPC arises from identical or substantially-similar claims, circumstances, and alleged injury as the Plaintiffs' case against Defendants; (2) maintenance of the Third Party Action will not prejudice Ms. Dotson, the Plaintiffs, or the other TPDs, nor will it unnecessarily complicate the Plaintiffs' claims because the TPDs' activities are a necessary element of Plaintiffs' claims and an essential part of Defendants' defense; and (3) it will prevent prejudice to Defendants and wasted judicial resources by avoiding the costs and time that would be lost to lengthy, unnecessary, serial litigation. *See Hicks.*, 165 F.R.D. at 379; *Tower Mortg. Corp. v. Reynolds*, 81 F.R.D. 560 (W.D.Okla. 1978); 6 FED.PRAC. & PROC.CIV.2D § 1442.

a. Ms. Dotson will not be prejudiced by maintenance of the Third Party Action because her activities are a necessary element of Plaintiffs' claims.

Although Plaintiffs must arguably account for the TPDs' activities for each of their causation-based claims,[5] Plaintiffs' need for evidence of the TPDs' activities is unequivocally demonstrated with respect to Plaintiffs' claim for natural resource damages ("NRD"). *See* FAC at ¶¶ 78-89. An NRD plaintiff's evidentiary burden is two-fold: (1) injury, and (2) causation. *See Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 674 (D. Idaho 1986) (a "causal link between

[5] Despite CERCLA's imposition of strict liability, Plaintiffs must provide causation evidence in support of their CERCLA cost recovery claims arising from their broad, general allegations of alleged "releases" of "wastes" in the million-plus acre IRW. *See, e.g., Thomas v. FAG Bearings Corp.*, 846 F.Supp. 1382, 1387-90 (W.D. Mo. 1994) (CERCLA plaintiffs should not "confuse[] the principle of strict liability for the effects of a release, with the antecedent question of whether the release has any effects at all…Once the discovered wastes are no longer in the immediate vicinity of the [release]…the question becomes one of causation, and 'fingerprinting becomes necessary to prove that the release was a substantial factor'" in causing the alleged response costs.).

releases and…damages which flowed therefrom" is required; CERCLA's "strict liability does not abrogate the necessity of showing causation").

With respect to injury, Plaintiffs must by some means demonstrate that the natural resources have suffered harm, compared to the "baseline" condition that the natural resources would have been in but for the alleged release. *See id.*; 43 C.F.R. §11.72(b) (to support a claim for NRD, trustees are required to provide "[b]aseline data [which] should reflect conditions that would have been expected at the assessment area had the…release of hazardous substances not occurred, taking into account both natural processes and those that are the result of human activities") (emphasis added). Therefore, with or without the Third Party Action, Plaintiffs will be required to present evidence of what the IRW would have looked like without Defendants' alleged activities – taking into account the activities of the TPDs and other natural processes. *See id.; accord Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003) (NRD plaintiffs must provide causation evidence that at least some of the alleged injury "would have occurred only if the Defendant's amount of release had occurred").

This requirement of establishing "baseline" conditions through an accounting of natural and other man-made causes has also been used with respect to claims for trespass and nuisance. In *Steilacoom Lake Improvement Club, Inc. v. State of Washington, et al.*, 01-CV-05529-RJB (W.D. Wash. Sept. 17, 2003), *aff'd.*, 2005 WL 1606063 (9th Cir. July 6, 2005), the district court addressed claims similar to those now asserted by Plaintiffs under strikingly similar facts. *See Steilacoom*, attached as Exhibit C to Defendants' *Response* to *Plaintiffs' Motion to Dismiss*. (Docket No. 495) In *Steilacoom*, plaintiffs asserted trespass and nuisance claims against defendants based upon allegations that defendants caused excessive amounts of phosphorous loading into Steilacoom Lake, resulting in algae problems and accelerated eutrophication of the

Lake. *See id*. at 6-10, 15, 17. The district court granted summary judgment to defendants because plaintiffs failed to provide evidence that defendants' alleged contribution of phosphorous, taken individually or collectively, caused any harm or was in excess of the naturally occurring level of phosphorous from other sources such as sediment erosion, other point and nonpoint sources, or "other watershed property owners, of which there are a great many."[6] *See id*. at 8-10, 18-19.

Moreover, the "complex environmental cases" cited by Ms. Dotson in support of her request for severance are distinguishable from this matter both on their facts and their requested relief. *See Motion* at 17-18, *citing United States v. Kramer*, 770 F. Supp. 954 (D.N.J. 1991) *and City of Wichita v. Aero Holdings, Inc*., 2000 WL 1480490 (D.Kan.Apr. 7, 2000). Each of these cases involved claims for cost recovery under CERCLA, not claims natural resource damages or common law trespass and nuisance. Furthermore, the *City of Wichita* case involved decidedly different circumstances because defendants in that matter sought leave to implead additional parties: (1) after significant discovery had occurred; (2) after depositions had been taken; (3) near imminent deadlines for expert witness disclosures; and (4) after the court had issued a case

[6] The court also found the absence of a total maximum daily load ("TMDL") standard for phosphorous to be "one other fact…of some importance" and generally refused plaintiffs' attempt to force the court to set regulatory standards that are more appropriately addressed through the administrative process. *See id*. at 12, 25 ("..the idea of the plaintiffs was that the court should take over the management of this problem…[but the court finds] that is an administrative process and a political process that is outside the appropriate reach of a Federal District Court."). The Clean Water Act directs States to set TMDLs for certain water bodies by completing a systemic assessment of all sources of a particular constituent, determining the total reduction necessary to achieve and sustain water quality, and then setting a maximum level of acceptable contribution from each source. *See* 33 U.S.C. § 1313(d). Defendants contend that the issues presented by this case are more appropriately handled by such an administrative process, and that the water quality impairment alleged by Plaintiffs cannot be effectively addressed until the State fulfills its statutory duty of assessing all sources of pollutants in the IRW and creating a TMDL as required by the Clean Water Act. Therefore, as in *Steilacoom*, the absence of a phosphorous TMDL for the IRW should also be a "fact…of some importance" to this Court. *See id*. at 12.

management order. *See id*. at *2. Therefore, in light of these material differences, the cases cited by Ms. Dotson do not support her requested relief under these circumstances.

b. Ms. Dotson will not be prejudiced by maintenance of the Third Party Action because her activities are a necessary element of Defendants' defense against Plaintiffs' claims.

Despite the fact that hundreds of persons and entities are causing phosphorous and other constituents to be released into the waters of the IRW, Plaintiffs seek to hold only Defendants jointly and severally liable for all of the alleged injury to the IRW. *See* FAC at § VI. Defendants have a due process right to defend themselves against these claims by challenging Plaintiffs' case for want of causation and demonstrating that the TPDs, including Ms. Dotson, are jointly or severally liable for the harm alleged by Plaintiffs. *See United States v. Asarco Inc*., 1998 WL 1799392, *4 (D. Idaho) (CERCLA NRD defendants' due process rights would be violated if they were not given a fair opportunity to "effectively challenge[] the assessment of injury and the causation of damages as well as the ability to assert certain defenses").

Specifically, Defendants are entitled to assert a "divisibility defense" to the imposition of joint and several liability by demonstrating that: (1) the harms alleged by Plaintiffs are distinct; and/or (2) there is a reasonable basis for determining Ms. Dotson's, the other TPDs', and Plaintiffs' contribution to any single harms. *See United States v. Burlington Northern R. Co*., 200 F.3d 679, 697 (10th Cir. 1999); RESTATEMENT (SECOND) OF TORTS § 433A. The defense of divisibility is an accepted means of avoiding the imposition of "excessive liability on parties for harm that is not fairly attributable to them." *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1119. The divisibility defense is applicable to several types of common law and statutory claims and such apportionment is commonly made in cases of nuisance arising from alleged pollution of streams. *See* RESTATEMENT (SECOND) OF TORTS § 433A, cmt. d.

Divisibility is also a specific defense to the imposition of joint and several liability under CERCLA. *See United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001). "A defendant need not prove that its 'waste did not, or could not, contribute' to any of the harm at a CERCLA site in order to establish divisibility, because it is also possible to prove divisibility of single harms based on volumetric, chronological, or other types of evidence." *Id.* at 719. "Distinct harms" are those that may properly be regarded as separate injuries. *See* RESTATEMENT (SECOND) OF TORTS § 433A (1965). "Defendants may be able to demonstrate that harms are distinct based on geographical considerations, such as where a site consists of 'noncontiguous' areas of soil contamination, or separate and distinct subterranean 'plumes' of groundwater contamination." *Hercules, Inc.*, 247 F.3d at 717-718.

In addition to recognizing the existence of distinct harms across geographically diverse areas, courts have also recognized that "[s]ingle harms may also be 'treated as divisible in terms of degree,' based, for example, on the relative quantities of waste discharged into the stream." *Id.* at 718. "Divisibility of this type may be provable even where wastes have become cross-contaminated and commingled, for 'commingling is not synonymous with indivisible harm.'" *Id*. A "single harm" may nonetheless be divisible

> because it is possible to discern the degree to which different parties contributed to the damage. The basis for division in such situations is that 'it is clear that each [defendant] has caused a separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other…

Id. Therefore, with or without the Third Party Action, Defendants will present evidence demonstrating that the harm alleged by Plaintiffs, if any, is divisible because other parties, including Ms. Dotson, have caused harm for which Defendants should not be held responsible. *See id.*; *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2nd Cir. 1993) (CERCLA defendants "should have the opportunity to show that the harm caused at [the site] was capable

of reasonable apportionment" and they are entitled to "present evidence relevant to establishing divisibility of harm.").

It is reversible error for a district court to deny defendants an opportunity to fully assert a divisibility defense by showing that they should not be held jointly and severally liable for the harm alleged by plaintiffs. *See Burlington Northern*, 200 F.3d at 697; *accord In re Bell Petro. Services, Inc.*, 3 F.3d 889, 902-03 (5th Cir.1993) (reversing the district court's imposition of joint and several liability under CERCLA, because there was a reasonable basis for apportioning liability and remanding for the district court to apportion damages); *Alcan Aluminum.*, 990 F.2d at 722; *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257 (3d Cir.1992); *United States v. Dico, Inc*., 136 F.3d 572, 578-79 (8th Cir. 1998).[7]

c. Defendants will be prejudiced by severing or staying the Third Party Action.

If this Court were to sever and/or stay the TPC, Defendants will be severely prejudiced because they will be forced to bear the costs of unnecessary, redundant litigation. Stated otherwise, severing or staying the Third Party Action creates the risk that Defendants will be forced to engage in duplicative litigation which will involve discovery and essentially the same witnesses, evidence, and legal theories. Given the complexity of the matters at hand, the expense of the redundant litigation would be extraordinary as Defendants would be required to pay numerous attorneys, experts, and litigation costs at least twice.

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[7] The divisibility doctrine is a legal defense to joint and several liability sought to be imposed by a plaintiff and as such, it is conceptually and legally distinct from contribution claims or equitable allocation of damages. *See Hercules, Inc*., 247 F.3d at 718. With or without the Third Party Action, the Court will be required to hear Defendants' evidence regarding the divisibility of the alleged injuries in the IRW based upon the activities of persons and entities now named as TPDs. *See, e.g., In re Bell Petro. Services, Inc.*, 3 F.3d at 902-03. As such, no economy or benefit will be had by severing or staying the Third Party Action.

Moreover, Defendants will be prejudiced by the practical considerations inherent to maintenance of separate trials. If this Court were to grant Ms. Dotson's requested relief pursuant to Rule 42(b), Plaintiffs' claims and the TPC would move forward as entirely separate actions to be tried to independent, and perhaps inconsistent, judgments. *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993) ("…if two juries were allowed to pass on an issue involving the same factual and legal elements, the verdicts rendered by those juries could be inconsistent, producing intolerably anomalous results."). Given the virtual identity between the factual and legal elements of Plaintiffs' claims and the Third Party Action, there is a very real risk that Defendants would suffer prejudice by being subject to two verdicts, "producing intolerably anomalous results." *See id*.

Defendants would suffer additional prejudice by severance or stay of the Third Party Action because they would be handicapped in their ability to obtain discovery from non-parties. Although Rule 45 provides the means for Defendants to obtain production of documents, inspection of property, or testimony from non-parties, the Federal Rules of Civil Procedure do not provide Defendants with any means to issue interrogatories or requests for admissions to non-parties. Without these mechanisms for efficient written discovery, Defendants would be prejudiced by having to obtain critical, discoverable information through a comparatively more cumbersome, time-consuming, and expensive process.

d. The As Yet Unheard TPDs May be Prejudiced by Severing or Staying the Third Party Action.

Potential prejudice to the TPDs is an equitable factor to be weighed by the Court as part of its determination of whether maintenance of the Third Party Action is desirable. *See In re CFS-Related Sec. Fraud Litig.*, 213 F.R.D. at 437-38. Therefore, this Court should not rule upon the *Motion* until all of the TPDs have had an opportunity to answer the TPC and be heard on the

issues raised by the *Motion*. This approach seems particularly prudent and compelling given the fact that many TPDs may not have received notice of the *Motion*, and, therefore, have not had an opportunity to consider whether it is in their best interest to have evidence of their contributions to alleged injury to the IRW presented in their absence.

e. Severing the Third Party Action will offend the interests of judicial economy and efficiency by creating unnecessary, redundant litigation.

The relief requested by Ms. Dotson would offend the interests of judicial economy by requiring this Court to preside over multiple cases consisting of essentially the same evidence and legal issues. As explained above, there is a substantial identity between Plaintiffs' claims against Defendants and the Defendants' claims against the TPDs. Therefore, if this Court were to sever or stay the Third Party Action, the inevitable result would be the creation of simultaneous or subsequent litigation which would require this Court to waste its limited resources by twice hearing the same witnesses, the same evidence, and the same legal arguments.

The Court's consideration of the *Motion* requires it to weigh efficiency against prejudice. *See Hicks*, 165 F.R.D. at 379. However, under the circumstances of this case, the equities weigh heavily in favor of maintaining the Third Party Action because: (1) there is no merit to Ms. Dotson's claim that she will be prejudiced by maintenance of the TPC because the Third Party Action will not inject materially different issues or evidence into the case; (2) Defendants will be substantially prejudiced by severing or staying the Third Party Action because doing so will cause Defendants to incur extraordinary and unnecessary expenses in pursuing essentially redundant litigation, and impair Defendants' ability to obtain discoverable information from the TPDs; (3) separating Plaintiffs' claims from the Third Party Action creates the risk of inconsistent verdicts upon substantially the same facts and causes of action; (4) the *Motion* is premature because the Court should not rule upon Ms. Dotson's requested relief until all the

TPDs have had an opportunity to answer the TPC and voice any concerns regarding the potential for them to be prejudiced Ms. Dotson's request; (5) because discovery has just begun in this matter and the Court has not yet issued a pretrial scheduling or case management order, there is ample time to craft a case management plan without prejudicing any party or disrupting any pretrial schedules; (6) as a result of Plaintiffs' broadly-asserted claims for decades of alleged injuries across millions of acres in the IRW, this case is already large and virtually unprecedented in its complexity and maintenance of the TPC would not cause the case to become unmanageable or beyond the reach of the tools provided in the Federal Judicial Center's Manual for Complex Litigation; and (7) maintenance of the TPC will provide a significant economy of time and resources for the Court by avoiding unnecessary, serial litigation. Although the Court must consider each of these factors, concerns of judicial economy and "interests of efficiency" should "outweigh the dangers of prejudice." *Hicks*, 165 F.R.D. at 379.

C. The Court Should Not Consider Ms. Dotson's *Motion* Until the Court Decides the Merits of Defendants' Multiple Motions to Dismiss.

As demonstrated above, Defendants have asserted viable legal claims against the TPDs which derive from the claims asserted by Plaintiffs. The Defendants have filed numerous motions seeking to dismiss almost all of Plaintiffs' claims based upon arguments of, *inter alia*, federal preemption, lack of subject matter jurisdiction, failure to exhaust administrative remedies, violation of the United States Constitution, state-law preclusion, and primary jurisdiction. *See, e.g.*, Docket Nos. 64, 65, 67, and 75. If any or all of these Motions to Dismiss are granted by the Court, there could be a significant reduction in the number of claims asserted by Plaintiffs against Defendants and thus, a corresponding reduction in the scope of Defendants' claims against Ms. Dotson and the other TPDs.

Without knowing which, if any, of Plaintiffs' claims will survive Defendants' Motions to Dismiss, the Court does not know the eventual size of the primary litigation or the Third Party Action or the extent to which the ultimate parties and issues will be inextricably intertwined. These considerations are essential components of the equities to be considered by the Court when determining whether maintenance of the Third Party Action is manageable and proper. *See* 1963 Amendments and Advisory Notes for Rule 14; *In re CFS-Related Sec. Fraud Litig.*, 213 F.R.D. at 437-38. Therefore, as a practical matter, Defendants respectfully suggest that the Court should defer consideration of the *Motion* until it has ruled upon Defendants' Motions to Dismiss.

III. CONCLUSION

For the reasons stated herein, this Court should deny the *Motion* as premature, legally deficient, and unsupported by considerations of the relevant equities and efficiencies.

Respectfully submitted,

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